IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8224 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

ASIF ABDUL KARIM BIDIWALA

Versus

UNION OF INDIA

Appearance:

1. Special Civil Application No. 8224 of 2004

MR SH SANJANWALA, SR.ADVOCATE with
MR YOGESH S LAKHANI for Petitioner
MR JITENDRA MALKAN for Respondent No. 1
MR MM TIRMIZI for Respondent No. 2
MS HB PUNANAI ASST GOVT PLEADER for Respondent No. 3

CORAM : HON'BLE MR.JUSTICE C.K.BUCH

Date of decision: 09/12/2004

ORAL JUDGEMENT

Heard Mr.S.H.Sanjanwala, learned senior counsel with Mr.Y.S.Lakhani, appearing for the petitioner-detenu and Mr.M.M.Tirmizi, learned Additional Standing Counsel appearing for Union of India and the concerned Department of Central Government, so also, Ms.H.B.Punani, learned AGP for respondent No.3.

.RS 2.

#. The present petition is under Article 226 of the Constitution of India praying for appropriate writ, order and direction for quashing the order of detention bearing F NO.673 / 4 / 2004-CUS-VII dated 28.5.2004 issued by Mr.R.K.Gupta, the Joint Secretary to the Government of India, Ministry of Finance, Department of Revenue, New Delhi in exercise of the powers vested under Section 3(1) of the COFEPOSA Act.

#.(i) The order of preventive detention has been passed on the allegation that the petitioner is responsible for breach of COFEPOSA Act and is required to be prevented from smuggling goods in future. After execution of the order on 1st June, 2004, he is kept under detention in Central Prison Sabarmati at Ahmedabad.

3(ii) For recording the subjective satisfaction, the detaining authority has placed reliance on the grounds conveyed to the detenu when the order under challenge was executed. The petitioner being aggrieved and dissatisfied has challenged the order alleging that the same is illegal, arbitrary, improper and execution of it is violative of privilege flowing from Article 21 and 22(5) of the Constitution of India. The backbone of the facts considered by the detaining authority as substantive ground to pass the order of preventive detention is that the scheme referred to in the gruonds, has been fraudulently availed and undue advantage has been taken and thereby the Union of India lost huge amount in crores.

3(iii) The papers of investigation carried out by D.R.I., according to the detaining authority which clearly indicate that by manipulating several documents and showign false transactions, the petitioner fraudulently availed undue and excessive DEPB and the petitioner thereby defrauded the Government and the officials etc.. The idea to cheat the Government was hatched by the Units mentioned in paragraph-4 and the persons named in the said paragraph including petitioner. The details have been given in tabular form in para-4 of the detention conveyed (Table mentioned on Page-52-53). The Court has considered the contents to appreciate the

justification of grounds for detention.

3(iv) The allegation against the present petitioner is that he is the proprietor of M/s Colosperse Chemicals Corporation, Surat and the partner in M/s Cosmos Chemicals and Intermediates, Surat and also in M/s Chevrolet Dyes Intermediates and Agro Chem Industries, Ankleshwar and thereby the petitioner has taken disadvantage. The authorities also considered the statement of the present petitioner recorded on 27th February, 2004 under Section 108 of the Customs Act, 1962 and the allegation is substantially the wrong confessed by the present petitioner. Various aspects including the statement of Mr.Ratnapal Chauhan, Branch Manager of M/s Chinubhai Kalidas & Brothers, CHA firm have been considered.

#.(i) One more allegation against the present petitioner is that though the petitioner had claimed rebate fraudulently and such rebates claims were filed with Maritime Commissioner in respect of the past exports of certain associate companies viz. M/s Clarity Intermediates and Pesticides and M/s Cosmos Chemicals and Intermediates as mentioned in para-10 of the ground for detention.

4.(ii) For short, the petitioner is ordered to be detained for the reasons mentioned in the grounds conveyed to the detenu (Annexure-B at page.49) and it is alleged that the petitioner has cheated the Government and caused loss of several Crores of Rupees. It is claimed that this facts traced because secret watch was kept on the activities of the firm headed by the present petitioner.

#. The petitioner has challenged the order of detention on various grounds mentioned in para-4 of the Memo of petition and Mr.Sanjanwala, learned senior counsel has taken this Court through the defence and stand taken by the present petitioner and the infirmity in the procedure followed before passing the order and also in execution of the same. While pointing out the infirmities, keeping in the background as to law on prevention detention, Mr.Sanjanwala has argued that the order under challenge is not sustainable in the eye of law on the grounds mentioned in the memo of the petition. However, he has focused his arguments mainly on two grounds. The first point pressed into service by the learned counsel Mr.Sanjanwala is that the order should be quashed on the ground that the representation made by the petitioner to the authority promptly and the delay caused in dealing

with the representation vitiates the sustainability of the detention and the order. It is pointed out from the papers available on record by Mr.Sanjanwala that delay caused in dealing with the representation is unreasonable and there is no satisfactory explanation for the Central Government as to why the same was not decided promptly as required by the law, that is, law carved out by number of decisions of this Court and the Apex Court.

#. Mr.Sanjanwala has in support of his submission has placed reliance mainly on the decision in MINESHKUMAR HIRALAL PARMAR V. STATE OF GUJARAT, 2002 (3) GLH (UJ) 2. In the cited decision, the Court was dealing with the petition challenging validity of the order of preventive detention passed under The Prevention of Black Marketing and Maintenance of Supply of Essential Committees, 1980, referring one another decision of this Court in Special Civil Application No.9664 2000 dated 16.3.2002 in the case of MULSHANKER KALYANBHAI JANI V. STATE OF GUJARAT, the Court has held that unexplained delay caused in dealing with the representation goes to the validity of the detention and the order and therefore, detention requires to be quashed and set aside. For the sake of convenience, I would like to quote relevant para-8 and 9 of the cited decision.

"8. This representation had reached to the office of the detaining authority on 22.4..2002. As the detaining authority had become functus officio immediately on that very day, this representation could have been forwarded to the State Government as well as the Union of India by the detaining authority. However, the same was lying unattended at that time in the office of the detaining authority till 26.4.2002. So this delay in despatching the representation to the Government would vitiate the continued detention of the petitioner and the petitioner should be set at liberty forthwith on this sole ground.

9. In response to a query raised by the Court Mr.Prajapati has submitted that even the day on which the representation had reached to the office of the detaining authority, i.e. 22.4.2002 and on 25.4.2002, the office of the detaining authority might have observed holiday on account of Mahavir Jayanti being a State holiday, the detaining authority was obliged to explain the delay caused, i.e. inaction in despatching the representation to the State

Government and the Union of India on 23.4.2002 and 24.4.2002. Thus this delay should be treated as fatal and at least the continued detention should be held to be violative of the Constitutional guarantee enshrined under Article 22(5) of the Constitution of India."

In case of RUPESH KANTILAL SAVLA V. STATE OF GUJRAT AND OTHERS, (2000) 9 SCC 201, the Apex Court has held that delayed disposal of the representation if not explained, then, the same should be construed as violative of privilege flowing from Article 21(5) of jurisdiction of The Prevention of Black Marketing and Maintenance of Supply of Essential Commodities Act, 1980. In the cited decision, the Apex Court found that no explanation is offered for delay between 18th of March and 1st May. So, on this ground alone, the order of detention should be quashed.

It is also submitted that ratio of the decision, facts are looked into of the case in RAJMAL V. STATE OF TAMILNADU AND OTHERS, AIR 1999 SC 684, would help the present petitioner.

#. Strong resistance is placed by Mr.M.Tirmizi, the learned Addl. Standing Counsel for the Central Government before this Court that this is not the case of delay at all, nor the case of non explanation of alleged delay. Initially, reply-affidavit was submitted on behalf of the Union of India but one further affidavit on behalf of respondent No.1 now is available on record dated 2nd December, 2004 whereby the respondent No.1 has tried to explain that the representation received, was processed expeditiously and an attempt to give an account of the time spent in dealing with the representation, has been given by Annexure-I attached with the affidavit. It would be convenient for the Court to quote details shown in Annexure-I. It is in tabular form and according to Mr.Tirmizi, this is a statement showing chronology of events in disposal of the representation made by the present petitioner. Representation is dated 7th July, 2004 and it was received by the detaining authority on 8th July, 2004 at New Delhi at about 17.50 Hrs. Date of decision is 22nd July and the account of time spent, is described as under :

Sr.No.	Date	Event
1.	07.07.2004	Representation made by the Detenu
2.	08.07.2004	Receipt of representation by the

		Detaining Authority at New Delhi at 1750 Hrs.
3.	09.07.2004	Receipt of Representation by Secretary (Revenue)
4.	09.07.2004	Representation forwarded to Sponsoring Authority at Ahmedabad by the Detaining Authority.
5.	12.07.2004	Receipt of representation by Sponsoring Authority at Ahmedabad.
6.	13.07.2004	Forwarding of representation by DRI, AZU to SRU, Surat.
7.	14.07.2004 to 16.07.2004	Receipt of representation at Surat and preparation of draft parawise comments.
8.	17.07.2004 & 18.07.2004	Holidays being Saturday & Sunday
9.	19.07.2004	Forwarding of Draft parawise comments to AZU, Ahmedabad.
10.	19.07.2004	Forwarding of parawise comments by AZU to CEIB
11.	21.07.2004	Receipt of parawise comments at CEIB, New Delhi at 1735 Hrs.
12.	22.07.2004	Representation replied to the Detenu.

#. It is rightly argued by Mr.Sanjanwala that non explanation and explanation which could be termed as not satisfactory should be put at par for the purpose of dealing with detention matters. According to Mr.Sanjanwala, the present case in view of the further affidavit, now available to the Court, can be said a case where the respondent has failed in explaining the delay caused. Annexure-I i.e. above referred table simply gives an account of the time spent and at some stages more reasonable time has been consumed and the authority has spent time for the reasons, for which, there was no need to keep representation pending. While enlarging the arguments, Mr.Sanjanwala has pointed out one aspect from the table that emerges from the facts stated in the table that the detaining authority had sent the representation to the sponsoring authority at Ahmedabad on 9th July, 2004. Whether the detaining authority was justified in sending the representation to have remarks from the sponsoring authority is the question raised and if the sponsoring authority was not able to respond promptly by forwarding it to some other agency, whether this exercise even if it is undertaken, can be said to be legitimately justified exercise, needs consideration when the stand of justification is being placed by the respondent No.1.

Having considered the details given to the Court in the tabular form, it appears that it was possible for the detaining authority to respond to the representation at the earliest. Mere tending the accounts of time spent cannot be equated with explanation which can be termed as satisfactory explanation. In case of RAJMAL [supra], the Apex Court has not even accepted the explanation whereby it was pointed out specifically to the Court that the Hon'ble Minister was on tour and therefore, he could not pass orders promptly. In this cited decision, such explanation for causing five days delay, has not been accepted as justifiable explanation.

#. The other ground pressed into service by Mr.Sanjanwala for petitioner also have some force. In the petition, it is categorically averred that the petitioner was supplied xerox copies of about 11,000 pages of documents and it was not physically possible to go through each document or to compare them interse for any purpose. The bunch of papers supplied were placed before the detaining authority when the authority was supposed to record subjective satisfaction on the point of necessity of passing preventive detention order. The list Annexure-C at page.75 produced with the petition clearly states that the documents mentioned in list or the documents relied upon by the detaining authority. It further transpires that it is in tabular form and there appears three columns, of which, the first signify "Serial Number", second is for "Description of the document" relied upon by the detaining authority and the third column indicates the "Page Number". The list itself runs in five and half pages. Item at Sr.No.105 clearly indicates that the documents mentioned at Sr.No.105 were at Sr.No.10946-10951. It is also averred in the petition in para-X of the grounds assailing the order that the following documents are, according to the petitioner, were not legible.

: Illegible Documents (i.e. Pages mentioned in the petition) :

417; 420; 466; 467; 636; 803; 1283;
1293; 1294; 1322; 1329; 1335; 1424; 14555;
1473; 1485; 1486; 1510; 1594; 1595; 1596;
1675; 1676; 1677; 1693; 1694; 1755; 1756;
1865; 1934; 1935; 2007; 2999; 3000; 3015;
3245; 3246; 3247; 3269; 3270; 3276; 3277;
3278; 3337; 3338; 3339; 4209; 5157; 5168;
5178; 5179; 5182; 5183; 5185; 5262; 5263;
5264; 5265; 5266; 5271; 5272; 5351; 5352;
5353; 5376; 5377; 5382; 5383; 5384; 5632;

5633; 5801; 5802; 6127; 6131; 6792; 6826;
6882; 6888; 6945; 6963; 6993; 6998; 7664;
7665; 7671; 7691; 7697; 7731; 7811; 7949;
8295; 8883; 8884; 9446; 9747; 9748; 9749;
9750; 9751; 9789; 9828; 9940; 9731; 9279;
9350; 9351; 9014; 10051; 10052, 10053, 100555;
10056; 10059; 10060; 10147; 10163; 10163;
10196; 10197; 10198; 10202; 10203; 10234;
10235; 10236; 10242; 10246; 10247; 10267;
10362; 10380; 10381; 10382; 10383; 10384;
10389; 10776; 10555; 10531; and 10532.

##. In response to the querry raised by the Court and number of documents have been placed by the learned Counsel before the Court and on perusal of the documents so tendered, to the Court is satisfied, giving a looking on each document that some of them, were partly illegible and some documents are of the nature, the Court finds that some of the documents are illegible and some of them is readable provided more than reasonable good effort is made by a person having perfect eye sight. When such plea has been taken in the cases earlier before this Court by detenu or even by the detenu praying quashing of detention on this very ground, the other High Courts have also developed the practice to have a look on such documents who are claimed to have been illegible. So, that exercise has been done by me and Court shall have to agree with the submission that the following documents at Serial Number;

1. 4721
2. 5271
3. 5272
4. 8295
5. 9350
6. 9351
7. 10203
8. 10531
9. 10532 and
10. 10776 are not legible.

The Court shall also have to accept the argument that the documents which are partly legible, cannot be said to be legible document as per the settled legal position. Of course, say of Mr.Tirmizi is that all the documents supplied with the order of detention and especially the grounds of detention conveyed to the petitioner have been recovered either from the custody of the petitioner or from the business places raided by the D.R.I. machinery and many of such documents are faint and are having faint colours. Some documents are of the

nature that by little efforts a detenu was able to trace out. Duplicate of such documents lying at Serial Number in the bunch supplied to him. So, it should not be construed as illegible documents have been supplied to the detenu. The attempt to show the original file of the Department of the Officers of the Department who are present in the Court, Mr.Tirmizi has attempted to submit that when the original document is a faint document or it is coloured invoice or voucher, how the Department can get totally legible copy. So, it should not be held that some illegible copies found in the bunch supplied to the detenu, would make the order of detention bad. The other mode of arguments placed before the Court is that it is obligatory on the part of the detenu to satisfy the Court that the documents which are not legible according to the detenu, are of great importance and contents thereof really were relevant to carve out his stand and especially in making representation to get the order of detention revoked. Unless the petitioner is able to satisfy that the illegibility of document has hampered his right to make effective representation, being the relevant document and referred to by the detaining authority, the order of detention should not be quashed and set aside on this technical ground.

##. I have considered the ratio of the decision in case of VIKRAMSINH PRAVINSINH RANA v. STATE OF GUJARAT & ANOTHER, 1988 (2) GLH 413, where the Division Bench of this Court has held that supply of illegible document would amount to non communication of the grounds for detention, and where the Bench has said thus;

> "We have ourselves looked into the copies of the judgment supplied to the detenu and we find that some of the pages are not legible at all. For example, pages 16 and 42 of the said judgement are not legible. When some of the pages of the judgment are not legible, that amounts to non communication of the grounds and, therefore, the orders of detention and the continued detention are both vitiated."
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> [Emphasis supplied]

##. It was possible for the Division Bench of this Court, if the logic applied by Mr.Tirmizi is accepted that effective representation could have been made in reference to contents of page-15 and 17 or any other relevant page-1 to 42 of the decision, but the stand taken by this Court was in reference to the privilege flowing from Article 22(5) of the Constitution of India

and therefore, the Court has held that the detention becomes unconstitutional. The another decision cited by learned advocate Mr.Sanjanwala in case of SMT.DHARMISTA BHAGAT V. STATE OF KARNATAKA & ANR., JT 1990 (1) S.C. 192 where the Apex Court has said that non supply of legible copy of the document "Panchnama" amounts to denial of an opportunity of making effective representation and the detention order therefore requires to be quashed. In this cited decision, the Panchnama supplied to the petitioner detenu was not found legible. It is not necessary to quote sub-Article (5) of the Article 22 of the Constitution of India. But the ratio of the decision in case of BHUPENDRASINH V. UNION OF INDIA, 1984 (2) SCC 234 would positively help the present petitioner.

##.(i) At this stage, it is necessary to refer observations of Delhi High Court in case of BHAGAT RAU V. UNION OF INDIA, 1991 Cr.L.J. 2989, wherein the Court has in para-14 observed as under;

"14. It is not disputed that the documents which have been found to be illegible are those which were relied upon by the detaining authority for subjective satisfaction against the petitioner. These are, thus, the relief upon documents which were required to be furnished to the petitioner along with the grounds of detention. Can we in these circumstances, say that there has been a compliance of this mandatory provision of supplying the relied upon documents to the petitioner. The answer would obviously be in negative. It is not a case where the petitioner was asking for the copies of the documents which are only referred to and not actually relied upon. In such circumstances, there could be an argument that the petitioner is required to indicate in which manner he has been prejudiced. The case Kumarunnisa v. I.L.O.I. (1990) 4 Judgment Today Supreme Court 7 relied upon by the learned counsel for the respondent, thus, cannot be applicable to the facts of this case. xxx xxx xxx xxx.

It is further observed that;

15. xxx xxx xxx xxx . The supply of illegible copies pari passu with the grounds of detention cannot be said to be a compliance with regard to the supply of documents and in the eye of law it would be presumed that the documents

which are illegible have in fact not been supplied. xxx xxx xxx xxx. "

(ii) In another decision, the Delhi High Court in RAKESH KUMAR GUPTA V. UNION OF INDIA AND OTHERS, 1995 Cri.L.J. 1048 has held that non supply of legible copies of relied upon documents to detenu, is violative of Article 22 (5) of the Constitution of India. As mentioned earlier, when the petitioner is conveyed along with grounds of detention that the documents mentioned in the list in the entire bunch supplied to him, are the documents relied upon by the authority and on the strength of these documents, the authority has recorded subjective satisfaction to pass the order of preventive detention, it will be difficult for the Court to say that the petitioner was under obligation to place relevance of it or to ask to point out specific that as to which illegible document has hampered his right to make effective representative and in what manner. This Court is consistent in holding that non supply of legible copies of documents relied upon by the detaining authority while recording the subjective satisfaction vitiates the order being violative of Article 22(5) of the Constitution and this Court have quashed the order of preventive detention even in cases where the documents relied upon by the detaining authority, have been found even partly illegible.

##. In case of KAMALA DEVI KEDIA V. UNION OF INDIA, 1999 Cri.L.J. 4394, the Calcutta High Court has also held that non supply of legible document to detenu would vitiate the detention. In case of KAMALA DEVI (supra), it is further held that there was no material to show that legible portion of the documents were only taken into consideration by the detaining authority. This observations also would go to the root of the validity of the order under challenge in the present case because number of documents in present case, are partly legible only. When certain documents by encircling the illegible portion of that particular document, were shown to the learned Counsel for the respondent No.1 with a querry as to whether encircled portion of that particular documents is legible according to him. In response thereof, Mr.Tirmizi has submitted that similar documents are there in the bunch supplied to the detenu, so it is possible to get the details of illegible portion from the other similar documents which are fortunately legible. But the Court is of the view that the detenu who has been handed documents more than 10951 in numbers, would not be able to get a comparative view of each illegible document by perusing the other document to carve out his stand and

for making effective representation. It is rightly submitted that when a particular portion of the document is not legible, then it will be even difficult to compare the illegibility part with any other legible part.

##. Mr.Tirmizi, to meet with the arguments advanced on this point by Mr.Sanjanwala, has placed reliance on the decision of Delhi High Court in case of SHRI ABDUL QAHAR V. UNION OF INDIA AND OTHERS, 2002 Cri.L.J. 1709, and it would be beneficial to quote observations of the Division Bench of the High Court in para-7 of the judgment;

"7. It is well settled that non supply of relied upon documents by the detaining authority invalidates a detention as it tantamounts to denial of opportunity to the detenu to make an effective representation against his detention depriving him of a valuable safeguard provided under Art.22(5) of the Constitution. It would lead to same consequence when such documents are furnished but are illegible because a detenu in that event would again be deprived of this opportunity. But a mere allegation in this regard would not satisfy the requirement to vitiate the detention unless it was brought home that supplied documents were so ineligible that these could not be used to make an effective representative. It would be only in such a situation that detention would be invalidated."

##. It is also argued by Mr.Tirmizi that observations of the Supreme Court in case of UNION OF INDIA AND OTHERS V. MOHAMMED AHMED IBRAHIM AND OTHERS, 1993 Supp (1) SCC 405, where the Apex Court has remitted the matter to the High Court for fresh disposal because the High Court had turned down the order of detention on the ground that the copies of the document alleged to be illegible and non readable. The extent and nature of illegibility and its effect on the right of the representation in the context of its importance in formation of subjective satisfaction for detention, was not at all examined by the High Court. It is also argued that in view of these observations, this Court is supposed to decide that the right to make effective representative should be viewed in light of the observations made by the Apex Court in this cited decision. It was one of the arguments before the Apex Court that the appellant i.e. Union Of India should have been afforded an opportunity to assist the Court in a more careful scrutiny whether all the documents shown to the High Court were really those actually furnished by

the detaining authority or were copies made therefrom. This aspect would also required to be examined by the High Court. It is also observed that;

" xx xx According to the appellants were desired to indicate that the documents served by them on the detenu were not illegible and did convey effectively the purport of their content and the purpose for which they were relied upon. The High Court was of the view that there was no justification for any such opportunity as, according to the High Court, "no useful purpose would be served by adjourning the petition for filing reply because the point raised is such that it does not call for any reply."

##. This cited decision is considered by him, and the stand taken by the Union of India is materially different than the stand taken in the present case. The grievance of the Union of India before the Supreme Court that no reasonable opportunity to explain on the illegibility part or say documents found illegible and unreadable was properly afforded and a shadow of doubt was also thrown by placing arguments that some of the documents shown to the High Court, were actually not part of the document served to the detenu or the documents relied upon by the detaining authority, and therefore, this cited decision, the mater was remitted to the High Court keeping all the privileges of the detenu open.

##. The decision of Bombay High Court in case of ABDUL NASIR KAHN V. L.HMINGLIANA AND OTHERS, 1991 Cri.L.J. 507, wherein it is held that though documents was illegible, order could not be faulted for non communication of the grounds of detention infringing the Article 21 and 22(5) of the Constitution. This decision is cited by the learned counsel Mr.Tirmizi while developing the arguments that in the cited decision, the facts placed before the Court was that documents relating to certain grounds were not legible. But the documents, however, were not constituting the basic facts and the detaining authority had not made even casual reference of these documents in the grounds conveyed. According to Mr.Tirmizi, each document supplied to the detenu in the present case, are not referred to by the detaining authority in the grounds conveyed to the detenu and they do not constitute basic facts and the basic facts are clearly narrated in the grounds conveyed to the detenu. It would be beneficial to appreciate the say of Mr.Tirmizi to quote the relevant part of Para-18 of the

cited decision.

" xx xx xx xx. A close scrutiny of the grounds of detention unmistakably indicates that the detaining authority has made no reference whatsoever nor even a passing or casual reference to these alleged illegible documents. If this be so, in our opinion, grievance of the detenu is without any merits and cannot vitiate the detention order on the ground of non communication of the grounds of detention. Resultantly argument of Mr.Jethmalani as regards infringement of both facets of article 22(5) of the Constitution does not survive. "

Mr.Tirmizi has mainly focused on the observations made by the Bombay High Court on the last portion of the above quoted paragraph. But this finding recorded by the Bombay High Court is in reference to the facts discussed in para-17 of the cited decision. It was hampered before the Bombay High Court by Mr.Jethmalani who was appearing on behalf of the detenu - Abdul Nasir Khan that documents at Sr.No.404 to 408 are not legible and these documents were documents in connection with one patient Shri Jagdish V. Gurusahani and the Bombay High Court has observed that documents at page.407 dated 17th October and at 408 dated 19th October, 1989, these documents had no much relevance as they were of the date much prior to both incidents referred to by the detaining authority. The Bombay High Court has further observed that "it is true that documents at page.404 is partly legible but certainly it communicates the name of the patient namely Jagish Gursahani. Document at page.405 is described as Chemistry (1) report in connection with Jaggish Gursahani. The document page 40, in our opinion, is legible. Only some of the printed words in the columns are slightly faint. The documents at pages 407 and 408 cannot be termed as illegible documents at all. With this set of facts available on record, finding in para-18 referred to hereinabove is recorded.

##. When this Court has positively observed that the documents mentioned hereinabove, shown at Serial No.1 to 10 in Para (10) are illegible and some of the documents are partly illegible, it will be difficult for the Court to agree with the learned counsel Mr.Tirmizi that ratio of the decision of Bombay High Court would help the respondent No.1 - Union of India. The documents even as per the detaining authority have been relied upon for constitution for grounds of detention and for recording subjective satisfaction, then non supply of legible copy

of each document, would amount to non supply of grounds. Supply of legible documents is insisted in such cases in the background of the constitutional safeguard provided under Article 21 and 22(5) of the Constitution. The jurisdiction of detention can start flowing only if the required compliance in light of the scheme of Article 22 is made.

##. In the same way, ratio of the decision in case of RAVI CHABIRAM SHARMA V. R.H. MENDONCA AND OTHERS, 1999 Cri.L.J., 2960 would also not help the respondent. In the cited decision in para-20 and 22, the Bombay High Court has observed that allegedly illegible documents were not vital in formulating the grounds for detention, and therefore, it cannot be said that important right of the detenu under Article 22(5) has been violated. Such detention is not vitiated. The High Court has observed that "while appreciating the say of the detenu that only certain words or one or two sentences are faded away, but it was not possible for the Court to agree with the submission that these documents were totally illegible. Simultaneously, these documents were not found vital in formulating any reference to the grounds formulated by the detaining authority. The case before this Court is not a case of non supply of the copies of the documents where one or two sentences of the copies supplied have been found faded or based on the fact that the non supply of the document, which cannot be said to be totally irrelevant. Phraseology "totally illegal" used by Bombay High Court should be considered in light of the facts discussed in the cited decision and it may be found relative. The documents should be in the shape that a person having normal eye sight can read the document without making special efforts in a normal day light and this normal day light should be considered in the background of the place where the detenu is detained. It is true that in the present case, no such details are available, nor specific plea is pleaded by the detenu but when in open court room with sufficient lights on being asked to Counsel appearing for the parties, were not able to read certain documents and some part of the documents so supplied, are partly legible, found illegible. It is true that as per the case placed by Mr.Tirmizi, the grievance is as to loss sustained was great financial loss to the Government Exchequer but this great Country has zelously protected the liberty of an individual when the Courts have been and especially in case where Courts are called upon to appreciate the grievance of a person who is put under the orders of preventive detention, that is contrary to the law of basic principle of the criminal jurisprudence of this Country, where innocent is presumed

and guilt is to be established beyond reasonable doubt prior pushing a person into prison.

One more decision cited by Mr.Tirmizi of Bombay High Court in case of NANDKUMAR V. S. RAMAMURTHI, 1992 Cr.L.J. 1078 is also not able to take this Court into different direction other than what is carved out by this Court from the decision reported in VIKRAMSINH PRAVINSINH [Supra].

##. Even there is more substance in the argument of Mr.Sanjanwala on the contention of delay. At this stage, I would like to refer the decision of the Apex Court in case of HARISH PAHWA V. STATE OF U.P., AIR 1981 SC 1126, wherein the Apex Court has said that;

" xx xx xx the impugned order of detention also requires to be quashed on the ground of delay in communicating decision on the representation to the detenu promptly. Relevant observations of the Apex Court are reproduced as under :-

" ..... We may make it clear, as we have done on numerous earlier occasions, that this Court does not look with equanimity upon such delays when the liberty of a person is concerned. Calling comments from other departments, seeking the opinion of Secretary after Secretary and allowing the representation to lie without being attended to is not the type of action which the State is expected to take in a matter of such vital import. We would emphasis that it is the duty of the State to proceed to determine representations of the character above mentioned with the utmost expedition, which means that the matter must be taken up for consideration as soon as such a representation is received and dealt with continuously (unless it is absolutely necessary to wait for some assistance in connection with it) until a final decision is taken and communicated to the detenu. This is not having been done in the present case we have no option but to declare the detention unconstitutional."

[Emphasis]

##. One more important argument advanced before the Court also needs consideration whereby it is submitted that the order under challenge is passed mechanically and it is inferable that the same is passed without application of mind. To strengthen this point of

submission, learned Senior Counsel Mr.Sanjanwala has drawn attention of the Court to documents at Page.9123 to 9129 and 970 to 976. These documents according to the petitioners are totally irrelevant in reference to the grounds for the detention conveyed to the petitioner in the case placed against the petitioner for recording subjective satisfaction. After going through the reply-affidavit, it seems that the stand taken by either side is not satisfactory. Merely because particular document was found during search or seizure of the documents when the investigation was going on in the premises owned and occupied by the petitioner, cannot be said to be the relevant document. The say of the detaining authority is accepted, even then, it was possible that the authority to mention that the documents that is, above referred pages are not found relevant to the authority. However, as they seized or recovered from the place under search, they have been provided. Absence of such or similar clarification in the grounds for detention conveyed, taken this Court to a reasonable inference that the order is passed mechanically and these documents ought not to have been shown in the list of "Relied upon Documents" supplied to the petitioner -detenu.

##. For short, the arguments advanced by Mr.Sanjanwala shall have to be accepted such order of detention or any further detention cannot sustain and the same requires to be quashed and set aside without entertaining into discussion of any other grounds raised by Mr.Sanjanwala on merit.

##. It is, however, observed that it will be obligatory on the part of the detenu and he is directed to cooperate with the Department in carrying out any further investigation in recording statements or further statements and when he is required to be confronted with other witnesses, or vice a versa that may be called or examined by the concerned Department. It is also true that it was possible that the concerned department could have done this exercise when the petitioner was in custody and under detention. However, considering the gravity of the allegations, the Court is inclined to observe that the petitioner shall cooperate with the Department in the process of investigation and further investigation.

##. In the result, the petition is hereby allowed and the impugned order of detention bearing F.No.673 / 4 / 2004-CUS-VIII dated 28.5.2004 issued by the respondent No.2 - The Joint Secretary to the Government of India,

Ministry of Finance, Department of Revenue, New Delhi against the detenu - Asif Abdul Karim Bidiwala under Section 3(1) of the COFEPOSA Act is hereby quashed and set aside. The petitioner - ASIF ABDUL KARIM BIDIWALA is ordered to be set at liberty forthwith if he is not required to be detained in any other case.

Rule is made absolute.

Direct Service is permitted.

##. At this stage, Mr.Tirmizi for the Union of India prays that the order dictated today by this Court, may not be signed today and if possible this Court should stay the order atleast for a week because it is possible for the respondent Union of India to approach the appellate forum by way of preferring Letters Patent Appeal. This proposition has been strongly resisted by Mr.Sanjanwala but request to grant some time so he can cite recent decision of this Court on this point. Request for grant of time is accepted. For argument on issue of grant of stay, matter is adjourned for tomorrow.

: Further order :
Date : 10-12-2004

##. Mr.Tirmizi, learned Addl. Standing Counsel for Central Government while continuing his submission today has drawn attention of the Court to one decision in Criminal Misc. Application No.8098 of 2003 dated 6th December, 2003 (Coram : A.L.Dave, J.), where this Court has suspended operation of the order of bail for four weeks to enable the complainant to approach the Supreme Court against grant of bail to the applicant No.2 of the bail petition. It is further argued that in similar way, this Court has stayed en-number of orders where the accused have been ordered bail. But this argument or decision placed before this Court was not helpful to respondent No.1. In the present case, the Court has held that appropriate writ of habeas corpus is required to be quashed and the petitioner requires to be set at liberty forthwith as the order of preventive detention passed by the authority is violative of privilege flowing from Article 21 and 22(5) of the Constitution and the same is not otherwise sustainable in the eye of law. In such fact situation, when this Court has said that detention is illegal or otherwise bad or unconstitutional, then operation of the order recording such finding, if stayed, would be very much frustrating. Moreover, a categorical

statement has been made by the learned counsel Mr.Sanjanwala that in one another matter, similar attempt was made on behalf of the Union of India on earlier occasion and thereafter, during the course of submission, learned Addl. Standing Counsel for the Central Government had not insisted for stay of the order that passed by the Court. Of course, a copy of the order is not before this Court. However, according to learned advocate Mr.Sanjanwala, this aspect was not recorded in the order but the fact remains that no stay was granted in that case, i.e., while disposing of Special Civil Application No.32 of 2004 decided by this Court [Coram : D.P.Buch, J.] .

##. Mr.Sanjanwala resisting the submission to place the order under suspension advanced by the learned counsel Mr.Tirmizi, Mr.Sanjanwala has pointed out that say of the Apex Court in case of UNION OF INDIA V. PREMNATH SAHANI AND OTHERS, where the Supreme Court even while granting Special Leave on a casual term has said that "we are unable to grant any stay". He has also drawn attention of the Court on observations of the Delhi High Court in case of PRAVIN LILADHAR DHOLAKIYA, this Court would like to quote relevant paragraph of the cited decision, which reads as under :

"These applications have been strongly opposed by the petitioners in the seven criminal writ petitions pending hearing. Mr.Sen urged that this Court has decided criminal writ petitions 1 to 5 and 10 of 1975 on the basis of law pronounced by the Supreme Court as it stands today and if the Court comes to the conclusion that detention is illegal, not to hear habeas corpus petitions would negative the rule of law. Mr.Dewpatary appearing for the some of the other petitioners has urged that the requirement of law in hearing habeas corpus matters is that the same should be decided within the shortest possible time. He urged that the learned Additional Solicitor General's arguments proceed on the assumption that the Supreme Court may change the settled law but no one can predicate that today. According to him the High Court must act in accordance with the law as in force now.

In Ghulam Sarwar v. Union of India and others AIR 1967 Supreme Court 1335, Subba Rao, C.J. dilated at length on the nature of a petition for issue of a writ in the nature of habeas corpus. After noticing the history of

such writ he observed as under :-

"This writ has been described by John Marshall, C.J. as "a great constitutional privilege". An eminent Judge observed "there is not higher duty than to maintain it unimparied". It was described as a magna carta of British liberty. Heavy penalties are imposed on a Judge who wrongfully refuses to entertain an application for a writ of habeas corpus. The history of the writ is the history of the conflict between power and liberty. The writ provides a prompt and effective remedy against illegal restraints. It is inextricably intertwined with the fundamental right of personal liberty. "Habeas Corpus" literally means "have his body". By this writ the Court can direct to have the body of the person detained to be brought before it in order to ascertain whether the detention is legal or illegal. Such is the predominant position of the writ in the Anglo-Saxon jurisprudence."

In the same judgment, the Court has further observed that;

"Linked with this is also question as to whether when a court has found an order as detention to be illegal, can it stop the operation of its judgment to enable a detaining authority whose order has been quashed to approach a higher court. We have not been shown any law on these aspects. The writ of habeas corpus is a high prerogative writ issued by superior courts at the instance of a subject aggrieved, by commanding the production of that subject and inquiring into the cause of his imprisonment. If in the opinion of the court there is no legal justification for the detention, the party has to be ordered to be released. Stay of the operation of such orders appears to be a contradiction of the jurisdiction exercised in issuing writs in the nature of habeas corpus. Indeed, in King-emperor vs. Vimla Bai Despande and another, 73 Indian Appeals 144, while granting special leave to appeal in respect of a detention, the Judicial Committee of the Privy Council did not stay the operation of the order of the High Court. Sir John Beaumont who delivered the judgment of the Board made it clear that the detenu should not in any event be rearrested in respect of the matters to which the appeal relates and that the petitioner

(King-Emperor) should pay the cost as between Solicitor and client incurred by the respondents both in opposing the portion and in the appeal. The approach of the Courts, therefore, seems to be that once a superior court has granted the writ of habeas corpus it cannot stay the operation of its judgement."

##. It is not necessary to reproduce the relevant part of the decision pointed out by learned counsel Mr.Sanjanwala reported in 1946 Privy Council (King Emperor v. Vimala Bai Deshpande). The Apex Court has consistently not accepted the request for stay in number of cases even while granting special leave on usual terms where the High Courts for found preventive detention illegal or violative of constitutional privileges.

For short, request to stay operation of the order is not found acceptable and therefore, the request is turned down.

Rule is made absolute in the aforesaid terms.

Direct Service is permitted.

[C.K.Buch, J.]

#kailash#